

J. Maguire
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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Lieutenant Colonel Marion A. Marvin, Jr.
USAF (Retired)

File: B-252123

Date: August 4, 1993

DIGEST

A retired member elected to change Survivor Benefit Plan (SBP) spouse coverage to the maximum level after marrying his second wife. The Air Force noted the change in the member's records, but did not make the change in its computerized payroll system, and deductions from retired pay for SBP premiums, begun for his first wife at reduced level, continued at the lesser amount. Member sought to verify added coverage for his second wife, and accepted the repeated explanation that second wife had reduced coverage and that unchanged deduction was therefore correct. On discovery of its error 9 years later, Air Force may nonetheless collect the unpaid extra premium, because member should have known in 1982 that amount of the extra premium was not being deducted from his pay, and because, despite error in payroll system, no error occurred in records governing SBP benefits, and member's wife would have received the higher benefit in the event of the member's death before correction of pay records.

DECISION

This action is in response to a request from Lieutenant Colonel (Lt. Col.) Marion A. Marvin, Jr. USAF (Retired) for reconsideration of our Claims Group's September 29, 1992, denial of waiver of his debt of \$15,768.59¹

Lt. Col. Marvin retired from the Air Force in 1967 and elected participation in the Retired Serviceman's Family Protection Plan (RSFPP). When the SBP became available he elected participation and chose a reduced annuity for his

¹The Air Force initially sought to collect \$20,120.91, including \$4818.05 in interest, from Lt. Col. Marvin. Subsequently, the Air Force dropped the claim for most of the interest, and calculated the debt at \$15,535.48. Later the debt was again recomputed and set at \$15,768.59.

wife and children. In March 1981 his wife died and his children were no longer dependents. In January 1982 he remarried.

On September 22, 1982, during an SBP "open season", he elected to change his second wife's SBP coverage from a reduced annuity to maximum coverage. The change form was apparently placed in his records, and reflected in records governing SBP annuity levels, but was not entered into the computerized retired pay system. Thus, Lt. Col. Marvin's SBP deduction showed no increase to reflect the change of SBP coverage, and his net pay remained unchanged when the election took effect.²

On unspecified later dates, according to Lt. Col. Marvin, he contacted various local and DFAS finance officers to inquire whether his wife had maximum SBP coverage, and was consistently told that he had elected reduced coverage and that the SBP deduction was correct. He accepted the explanation, and no correction in his pay records took place.

In 1991, Lt. Col. Marvin became aware of the Social Security offset against SBP annuity payments.³ Realizing that his wife's SBP annuity payments would be reduced significantly by the offset, he decided in March 1991 to renew his inquiries, this time with greater insistence. Eventually, in August 1991, the Air Force located his 1982 SBP election form and sent a copy to him. The Air Force then discovered its 1982 error, and sought to recover the more than \$15,000 in accumulated unpaid premiums.

Lt. Col. Marvin applied for a waiver of the debt, which the Air Force denied. Our Claims Group, by settlement dated September 29, 1992, affirmed denial of the waiver.

The waiver statute, 10 U.S.C. § 2774, provides that the Comptroller General may waive a claim of the United States arising out of an erroneous payment to a service member if

²The record shows that SBP premiums were deducted from Lieutenant Colonel Marvin's retired pay after the death of his first wife and prior to his election on behalf of his second wife. We have been informally advised that the erroneous deductions were refunded to him in March 1983.

³When the surviving spouse who is receiving an SBP annuity based on the member's military service becomes eligible for social security benefits based on the member's military service, in addition to the SBP annuity, a deduction of an amount equal to the social security benefit is made from the SBP annuity. 10 U.S.C. § 1451.

collection would be against equity and good conscience and not be in the best interest of the United States. This authority may not be exercised if there exists in connection with the claim, any indication of fraud, misrepresentation, fault or lack of good faith on the part of the member.

"Fault" as used in this section has been interpreted as including something more than a proven overt act or omission by the member. Thus we consider "fault" to exist if in light of all the facts it is determined that the member should have known that an error existed and taken action to have it corrected. The standard used is whether a reasonable person should have been aware that he was receiving payment in excess of the proper entitlement.

Lt. Col. Marvin states that he did not know and could not have known he was being overpaid. However, when he made the election to change from reduced to maximum coverage for his new spouse, he should have expected the amount of the SBP deduction from his retired pay to increase, and the amount of his net pay to be correspondingly reduced, reflecting the election.⁴ However, his net pay remained level during the time it should have changed.


Lt. Col. Marvin was clearly aware something was amiss when he initially inquired to Air Force finance officers about his SBP coverage. He states his concern then was with the adequacy of benefits his wife would receive, and that he was not concerned with the issue of costs to him. It is our view that a reasonably careful person would have been aware of the cost implications of increased coverage. Thus, when Lt. Col. Marvin noted something was amiss, he then might have raised cost questions accordingly, but did not. He therefore cannot be viewed as without fault in the matter as defined above.

Lt. Col. Marvin challenges the Air Force statement that his wife was covered under the maximum annuity from the time he submitted the change request, even though the change was not posted to his pay records until 1991. It is the position of the Air Force that the September 1982 change request was fully reflected in the records governing the amount of SBP benefits to which his spouse was entitled, so that his wife would have been entitled to the maximum benefit had Lt. Col. Marvin died during this period. We have no basis to doubt

⁴At the time the SBP change was submitted, the old cost of coverage was \$42.03 per month, the new cost per month was \$179.74. Thus Lt. Col. Marvin should have anticipated a large increase in the deduction of SBP premiums from his retired pay.

this statement by the Air Force, and thus must reject Lt. Col. Marvin's view on this point.

It is our view that Lt. Col Marvin knew or should have known he was being overpaid and should have insisted that the amount of the deduction be corrected. Since he did not, he cannot be said to be without "fault" in the matter and waiver is therefore not appropriate. Additional points advanced by Lt. Col. Marvin in his request for reconsideration do not affect this result. Accordingly, the denial of waiver is affirmed.



James F. Hinchman

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